IN THE UTAH COURT OF APPEALS

UTAH STATE TAX COMMISSION, Appellee/Petitioner, vs. H. DOUGLAS GOFF and LISA GOFF, Appellants/Respondents.	))))))))))	Case No. 20040867-CA

BRIEF OF APPELLEE/PETITIONER

On Appeal from the Order of the Honorable Glenn K. Iwasaki,
Third Judicial District Court of Salt Lake County, State of Utah

Oral argument and published decision requested.

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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction over this matter under Utah Code Ann. § 78-2a-3(2)(j) (West 2004) and Utah Rules of Appellate Procedure, Rule 3(a). The Utah Supreme Court had original appellate jurisdiction under Utah Code Ann. § 78-2-2(3)(j) (West 2004), but assigned this case to the Utah Court of Appeals under Utah Code Ann. § 78-2-2(4) (West 2004).

STATEMENT OF ISSUES AND STANDARD OF REVIEW

Issue 1: Whether the District Court's admission of Commission and Department of Workforce Services records under Utah R. Evidence, Rules 803(6) or 803(8) was beyond the District's Court's discretion.

Standard of Review: Generally, the standard of review for evidentiary issues is abuse of discretion. State v. Drawn, 791 P.2d 890, 894 (Utah App. 1990), cert. denied, 804 P.2d 1232 (Utah 1990); State v. Pena, 869 P.2d 932, 938 (Utah 1994). As to the business records exception, "broad discretion is given to the trial court;" however, the "determination must be based on an adequate foundation." Trolley Square Assocs. v. Nielson, 886 P.2d 61, 66 (Utah App. 1994). Foundation issues may contain mixed questions of law and fact. Hansen v. Heath, 852 P.2d 977, 978 (Utah 1993) (addressing the hearsay exception found in Utah R. Evid, R. 803(4)). In mixed questions of law and fact, a trial court is accorded discretion based on a continuum ranging from "little or no discretion to broad discretion." State v. Doporto, 935 P.2d 484, 489 (Utah 1997) (citing Pena, 869 P.2d at 935-38). Here, the District Court applied the correct legal standard and

properly exercised its discretion in finding a factual basis to support the legal standard.

Issue 2: Alternatively, if the Court concludes that the Commission and Department of Workforce Service records should not have been admitted, then such error is harmless because the Goffs themselves submitted substantially the same documents or because the totality of the other evidence submitted supports the District Court's finding.

The Goffs overstate the issues in their brief. The Court of Appeals has already dismissed all other issues raised by the Goffs in its Memorandum Decision, dated January 6, 2005. See Addendum A, "Memorandum Decision."

DETERMINATIVE STATUTES AND RULES

1. Utah Code Ann. § 59-1-707 (West 2004). Writ of mandate requiring taxpayer to file return.
2. Utah Code Ann. § 59-10-502 (West 2004). Persons required to file returns.
3. Utah Code Ann. § 59-10-506 (West 2004). Returns prepared for or executed by commission.
4. Utah Code Ann. § 59-10-514(1) (West 2004). Place and time for filing returns.
5. Utah Rules of Evidence, Rule 803(6) and (8) (2004).
6. Utah Rules of Evidence, Rule 102 (2004).

(Attached as Addendum B.)

STATEMENT OF THE CASE

Summary of Procedural History

On June 2, 2004, the Commission filed two Verified Petitions for Writs of Mandate in the Third Judicial District Court of the State of Utah pursuant to Utah Code Ann. § 59-1-707 (West 2004). The Petitions asked the District Court to compel Lisa Goff ("Ms. Goff") and H. Douglas Goff ("Mr. Goff") to file true, accurate, and complete Utah Resident Individual Income Tax Returns.

Petitions for writ of mandate requested under Utah Code Ann. § 59-1-707 are summary proceedings. The statute only requires an evidentiary hearing to be held at the request of a respondent in order to provide an opportunity for the respondent to contest the petition. Id. The issue in a writ of mandate proceeding is whether the respondent is required to file a Utah individual income tax return. Id. The District Court does not determine a respondent's ultimate tax liability. Id.

On July 12, 2004, the District Court held and addressed Ms. Goff's Motion to Consolidate and Mr. Goff's Motion to Represent Ms. Goff. The motion to consolidate was granted and the motion for Mr. Goff to represent Ms. Goff was denied. (Third District Ct. R. 127.)

On August 16, 2004, the District Court held the hearing on the Goffs' objection to petitions for writ of mandate, hearing oral arguments and receiving evidence. The District Court ruled in favor of the Commission, granting the writs and denying the Goffs' motion to dismiss. (R. 216-17.) On Sept 21, 2004, after objections from the Goffs

both to the amount of attorney fees and costs and to the form of the order, the District Court issued its final Writ of Mandate and Judgment, ordering the Goffs to file income tax returns for tax years 1996 through 2002 (except 1999 with respect to Mr. Goff) and to pay attorney fees and costs. (R. 263, Addendum C, Writ of Mandate and Judgment.)

The Goffs appealed the District Court decision. The Commission filed a motion for Summary Disposition with this Court on November 8, 2004. This Court granted the motion in part and denied the motion in part in its January 6, 2005 memorandum order. Addendum A. The memorandum decision held that the Commission was not required to exhaust administrative remedies before pursuing a writ of mandate in District Court, and that the Goffs would be required to file income tax returns if the Commission showed that the Goffs' income exceeded the established thresholds. (Addendum A, Mem. Decision at 3.) The only issue not dismissed by this Court pertains to the admission by the District Court of Commission and Department of Workforce records Id.

STATEMENT OF THE FACTS

The District Court determined that the Goffs, for the years 1996 to 2000 (excluding 1999 for Mr. Goff) (the "years in question"), had been residents of Utah and had received income exceeding the statutory thresholds that trigger the requirement to file Utah individual income tax returns. (R. 263-65, Addendum C.)

The Goffs admit they have not filed Utah State income tax returns for years 1996 through 2002 even though Ms. Goff admits to being employed as a school teacher for Bonneville High School and Mr. Goff admits to receiving "earnings" and "other forms of

income from "private enterprise" during the years in question. (R. 298:17-19; R. 41, 46, ¶¶ 14, 15, Goff Status and Disclosure Aff. of Material Facts.) The Goffs admit to Utah as their domicile during the years in question. (R. 298: 17, 26-7, Goffs' Response in Opposition to Commission's Motion for Summary Disposition filed with this Court at 3.)

Ms Goff also testified to generally receiving an approximate compensation of $40,000 annually from her employer, Bonneville High School. (R. 298: 17-19.) She also testified that in 1996 she received approximately $33,802 of compensation from her employer, Bonneville High School. (R. 298: 17-19.)

As to other specific questions related to their income, the Goffs invoked the Fifth Amendment and refused to deny or confirm the actual amounts of income received. (Addendum G, R. 298: 22-24, 27-28.)

The Commission entered into evidence at the District Court the amounts of the triggering thresholds for the Utah filing requirement. (R. 218, Addendum F, Ex. D-6.) This Court has already ruled that the threshold amounts supplied by the Commission apply to the Goffs. (Addendum A, Mem. Decision.) The Commission also supplied the District Court with evidence of the Goffs' incomes. The table below summarizes both the statutory filing thresholds, and the Goffs' incomes as presented into evidence at the District Court.

Year	Mr. Goff's Income	Ms. Goff's Income	Threshold: Married Filing *Separately*	Threshold: Married Filing *Jointly* (with 2 exemptions)[1]	Threshold: Filing as Single
1996	$10,658	$33,851	$1,913	$10,526	$5,913
1997	$27,281	$34,813	$1,988	$10,876	$6,138
1998	$13,911	$36,732	$2,025	$11,150	$6,275
1999	–	$39,114	$2,063	$11,326	$6,363
2000	$11,391	$38,094	$2,100	$11,550	$6,500
2001	$31,496	$41,739	$2,175	$11,950	$6,725
2002	$32,798	$45,386	$3,000	$13,850	$5,263

The District Court determined sufficient evidence existed to find that the Goffs were required to file income tax returns for the years in question. (R. 263-65; R. 298: 124.). This finding is supported by the admissions of the Goffs at the hearing and in pleadings as discussed above. The finding is also supported by Commission records, Department of Workforce Services records, and the testimony of Daniel Engh, an expert in determining Utah taxable income. (R. 218, Ex. P-1, P-5, D-6; R. 298: 63-67.)

The records of the Commission were introduced through the testimony of Dolores Furniss as Exhibit P-1. (R. 218, Addendum D.) Ms. Furniss testified that she is the custodian of the Commission's records (R. 298: 32-33, 48), that the Commission keeps the records in the ordinary and usual course of business, (R. 218, Addendum D Ex. P-1), and that the documents submitted as the records are true and correct compilations of the information kept in the Commission's regularly kept records. (R. 298: 31-33.) Ms.

[1] Figures in this column, for the years 1996 to 2001, are calculated using the lower personal exemption under Utah Code Ann. § 59-10-114(1)(d).

Furniss testified that the Commission records were based upon IRS W-2s and 1099 statements filed by the Goffs' employers. (R. 298: 31, 52-53.)

The Commission also introduced Exhibit P-5 consisting of certified records from the Utah Department of Workforce Services that independently corroborate the Commission's records. (R. 218.) These records show the Goffs' incomes as reported to the Department of Workforce Services for purposes of unemployment insurance premiums. (R. 298: 70.) The records are certified by the notarized certification of Tani Pack Downing, disclosure officer and attorney for the Department of Workforce Services. (R.218, Addendum E Ex. P-5.)

Daniel Engh, an Audit Manager of the Commission, testified, based upon his review of Commission records, that the Goffs had income that exceeded the threshold amounts for each of the years in question and were therefore required to file tax returns. (R. 298: 63-67.) Mr. Engh provided the same testimony in an affidavit that was entered as evidence by the Goffs. (R.218, Addendum F Ex. D-6.) Attached to this affidavit were substantially the same documents as those admitted in Exhibit P-1. Id. (R. 218, Addendum F Ex. D-6.)

The Goffs presented no evidence to contradict the evidence submitted by the Commission.

SUMMARY OF ARGUMENTS

The District Court's Writ of Mandate and Judgment should be affirmed. The District Court's admission of Commission and Department of Workforce Service documents

under the business or public records exceptions to hearsay was within its discretion. All elements to these exceptions are satisfied. Morever, if such error exists, it is harmless because the Goffs introduced substantially the same records in their exhibit D-6.

Even if the Court concludes that the District Court exceeded its discretion in admitting the documents and that it could not consider substantially the same records introduced by the Goffs, such error is also harmless. The Court must still sustain the District Court's finding, that the Goffs are required to file income tax returns, based upon the totality of the other evidence submitted. This evidence consists of Verified Petitions, the testimony of an expert, Mr. Engh, and the admissions of the Goffs in pleadings and at the hearing. This evidence, coupled with no contrary evidence offered by the Goffs, fully supports the District Court's findings of fact.

An inference in favor of the Commission is created by the Goffs' refusal to testify on Fifth Amendment grounds. The Goffs were specifically questioned as to the amounts and source of their income and they refused to answer by taking the Fifth Amendment. Because this is a civil matter, the refusal by the Goffs to answer creates an inference that the income amounts presented by the Commission are correct. Baxter v. Palmigiano, 425 U.S. 308, 318 (1976).

Finally, the Commission requests an award of attorneys fees and costs associated with this appeal, as allowed under Utah Code Ann. § 59-1-707 (2004).

ARGUMENT

The evidence the District Court relied upon in ordering the Goffs to file Utah Individual Income Tax Returns for the Years in Question was properly admitted and is more than adequate to support a finding, as required by Utah Code Ann. § 59-1-707, that the Goffs are required under Utah law to file a Utah Individual Income Tax Return for the Years in Question. All other issues, procedural or otherwise, have already been decided by this Court in favor of the Commission. Accordingly, this Court should affirm the District Court's ruling in its entirety.

I. THE DISTRICT COURT'S ADMISSION OF COMMISSION AND DEPARTMENT OF WORKFORCE SERVICES RECORDS WAS WITHIN ITS DISCRETION.

A. The Commission Records Satisfy the Hearsay Exceptions Under Utah R. Evid., Rules 803(6) and 803(8) (2004).

The Commission introduced its own records contained in Exhibit P-1. (Addendum D.) These documents were properly admitted under the business records hearsay exception or the public records hearsay exception. See Utah R. Evidence, Rules 803(6) and 803(8) (2004). The Utah Supreme Court has laid out four elements that constitute proper foundation for admission of a business record:

> (1) the record must be made in the regular course of the business or entity which keeps the records; (2) the record must have been made at the time of, or in close proximity to, the occurrence of the act, condition, or event recorded; (3) the evidence must support a conclusion that after recordation the document was kept under circumstances that would preserve its integrity; and (4) the sources of the information from which the entry was made and the circumstances of the

> preparation of the document were such as to indicate its trustworthiness.

Utah v. Bertul, 664 P.2d 1181, 1184 (Utah 1983).

The evidence provided at the hearing satisfies these foundational requirements. Dolores Furniss, disclosure officer of the Commission, testified that the Commission compiles the records as a regular practice in the regular course of business. (R. 298: 52-53.) Ms. Furniss testified that the records are made at the same time the Commission receives the information. (R. 298: 33.) The testimony of Ms. Furniss showed that the Commission records the information it receives without alteration. (R. 298: 33, 38.) Finally, Ms. Furniss testified extensively as to the trustworthiness of the source of the information contained in the Commission's records. (Id.) Ms. Furniss testified that Commission' records were based upon IRS W-2 and 1099 statements filed by the Goffs' employers with the Internal Revenue Service. (R. 298: 31, 52-53.) These statements are not altered by the IRS and are transmitted to the Commission under a statutorily authorized agreement. (R. 298: 52-53.) In contrast, the Goffs have made no showing to indicate that the Commission records or the Internal Revenue Service records are in any way untrustworthy.

The records in Exhibit P-1 also meet the public records exception to the hearsay rule, found in Utah R. of Evid., Rule 803(8). That rule allows admission of records

> of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, . . . or (C) in civil actions and proceedings . . . factual

> findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

The Commission's records are records of a public office which set forth the Commission's observations and factual findings with regards to the Goffs' income. Hence, they fall within the public records exception. The plain language of Rule 803(8) does not require that the records themselves be available to the public at large, but merely requires that the they be records of a public agency.

Courts have ruled that IRS forms and records are admissible under the business records and public records exceptions to hearsay under federal law. Hughes v. United States, 953 F.2d 531, 539-40 (9th Cir. 1991) (concluding that IRS forms and records are admissible as public records even though they may be computer compilations); In Re: GARM, 114 B.R. 414, 416 -17 (M.D. Pa. 1990) (holding that IRS assessment records satisfied the business records and public records exception). This Court should find likewise as to the Commission's records.

The District Court was within its discretion in admitting the records of the Commission under Rule 803(6) or 803(8).

B. Personal Knowledge is Not a Requirement for the Admission of Commission Records Under Rule 803(6) and 803(8).

The Goffs argue that the Commission records should not be admitted because Dolores Furniss did not have personal knowledge of the information contained in the records. This argument is directly contrary to the plain statutory purpose of Rules 803(6)

and Rule 803(8). These rules provide an exception to the hearsay rule. Because the records are admitted as an exception to hearsay, personal knowledge is not required. See also Utah Code Ann. §§ 78-25-16.5(3) and 78-25-3 (West 2004).

Section 78-25-16.5 addresses admissibility of business records directly. Subsections (2) and (3) read, in pertinent part:

> (2) In any court in this state, any writing or record . . . made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of that act, transaction, occurrence, or event, if made in the regular course of any business, and if it was the regular course of the business to make the memorandum or record at the time of the act, transaction, occurrence, or event or within a reasonable time thereafter.
>
> (3) All circumstances, other than those set forth in Subsection (2), of the making of the writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but those circumstances do not affect its admissibility.

Section 78-25-3, addressing public records, reads:

> Entries in public or other official books or records, made in the performance of his duty by a public officer of this state or by any other person in the performance of a duty specially enjoined by the law, are prima facie evidence of the facts stated therein.

As indicated by these statutes, personal knowledge is not required for admissibility and lack of personal knowledge only goes to the weight to be given to the evidence. See id.

The Commission did not discuss Internal Revenue Service documents to prove the truth of the matter therein. Reference to such documents by Commission witnesses was intended to establish the "trustworthy" foundation requirement set forth in Bertul, 664

P.2d at 1184, and Rule 803(6) for the Commission's own records.

The Goffs' reliance upon In the Interest of W.S. and J.S., 939 P.2d 196 (Utah 1987), is misplaced. In that case, the Court acknowledged that the subject records were admissible as public records despite constituting double hearsay. Id. The Court held that reliance on the same as the sole evidence in a custody matter was error. Id. Here, the Commission records are supported by the testimony of experts, the Goffs' own admissions and documents from the Department of Workforce Services.

The non-controlling case cited by Goffs, United States v. Vigneau, 187 F.3d 70 (1st Cir. 1999), is distinguishable in that the Commission is statutorily authorized to rely on such records to make a "prima facie good and sufficient" determination of tax liability for "all legal purposes" as part of its ordinary course of business. Utah Code Ann. 59-10-506(2)(b) (permitting the Commission to make "a return from its own knowledge" with such return "prima facie good and sufficient for all legal purposes").

C. Department of Workforce Services Records Satisfy the Hearsay Exceptions Under Rule 803(8).

The Utah Department of Workforce Services records were also properly admitted. (R. 298: 71.) Exhibit P-5 contains records indicating wage and salary information reported on returns filed by employers with the Department of Workforce Services for purposes of unemployment insurance. (R. 298: 70.) These records independently corroborate the Commission's records.

These records are admissible under Utah Rules of Evidence, Rule 803(8), the

public records exception to the hearsay rule. As attested to by Tani Pack Downing in the certifications accompanying Exhibit P-5, the records in the Exhibit are the Department's records taken from reports filed with the Department of Workforce Services ("DWS"). They thus meet the requirements of Rule 803(8) public records exception. Daniel Engh further provided foundational testimony regarding the records. (R. 298: 69-73.)

Utah Code Ann. § 35A-4-312(5)(g) specifically authorizes the disclosure of these records to the Commission for tax "audit verification" and "state or federal tax compliance" purposes. The admission of Department of Work Force Service documents in this writ of mandate proceeding fulfills these purposes[2].

II. EVEN IF THIS COURT FINDS THE DISTRICT COURT EXCEEDED ITS DISCRETION IN ADMITTING COMMISSION AND DEPARTMENT OF WORKFORCE RECORDS, SUCH ERROR IS HARMLESS BECAUSE THE GOFFS INTRODUCED SUBSTANTIALLY THE SAME DOCUMENTS OR BECAUSE THE TOTALITY OF THE OTHER EVIDENCE SUPPORTS THE DISTRICT COURT'S FACTUAL FINDING THAT THE GOFFS WERE OBLIGATED TO FILE TAX RETURNS.

A. Even if This Court's Finds that the District Court Abused Its Discretion in Admitting Commission and Department of Workforce Service Documents, Such Error Is Harmless Because the Goffs' Offered Into Evidence Substantially the Same Documents.

The records offered into evidence in Exhibits P-1 and P-5 were also offered into

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[2] While Section 35A-4-312(5)(g) authorizes disclosure of the records to the Commission, the statute is unclear on whether an order admitting the documents is required under Section 35A-4-312(4)(a) (requiring that Section 63-2-202(7) be met before admission into evidence). In any event, the record supports a finding of the foundational requirements set forth in Section 63-2-202(7). (R. 298: 71-73.)

evidence by the Goffs, and were accepted by the District Court as part of Exhibit D-6. (R. 218). Thus, even if Exhibits P-1 or P-5 are not admissible, the records still come in as part of Exhibit D-6. Exhibit D-6 alone is sufficient to support the District Court's order.

While the Goffs claim that Exhibit D-6 should have been considered by the District Court only for limited purposes, the Goffs made no indication of this until *after* the District Court had ruled on the Writ of Mandate. (See R. 298: 76-83, 125-126.) When evidence is introduced with the intent that it be used only for a limited purpose, then the proponent has the duty of informing the court of the limited purpose of the admission of the evidence. Staniewicz v. Beecham, 687 F.2d 526 (1st Cir. 1982) (citing Fed. R. Evid., Rule 105, identical to Utah R. Evid., Rule 105). Without such a request for limitation, evidence "is to be considered and given its natural probative effect." Diaz v. U.S., 223 U.S. 442, 450-453 (1912). In Diaz, the defendant offered into evidence a record that would have otherwise been considered hearsay. Id. The defendant later objected to the use of the record as evidence against the defendant. Id. The United States Supreme Court first observed that the record was offered "without qualification or restriction" and that the entire record, including those parts that were both favorable and unfavorable to the defendant, was proffered and received into evidence. Id. The Court, noting that it was the defendant who had offered the records into evidence, concluded that "[i]n these circumstances the testimony was rightly treated as admitted generally, as applicable to any issue which it tended to prove, and as equally available to the government and the

accused." Id.

Like the defendant in Diaz, the Goffs did not inform the District Court of the limited purposes for which the Exhibit was being offered. The Goffs waited until after the District Court had ruled on the Writ of Mandate before instructing the District Court that they wished the Exhibit to be entered only for limited use. If Mr. Goff wanted the District Court to consider Exhibit D-6 only for limited purposes, he should have made that explicitly clear to the District Court. Notably, the Goffs proffered not just Mr. Engh's affidavit, upon which he questioned Mr. Engh (R. 298: 76-83), but also the records that were attached to the affidavit and incriminating to the Goffs. The Goffs' failure to exclude those portions of the exhibit that were unfavorable to them brings their case directly in line with the Supreme Court's ruling in Diaz. Accordingly, the District Court was entitled to use the evidence in Exhibit D-6 to the full extent of "its natural probative effect" with regards "to any issue which it tended to prove." Diaz, 223 U.S. at 450. This Court should affirm the District Court.

B. Even if the Court Finds Error in the District Court's Admission of Commission and Workforce Service Records and in its Reliance Upon the Substantially Same Records Introduced by the Goffs, Such Error is Still Harmless Based Upon the Totality of the Other Evidence Introduced.

Even without the Commission and Department of Workforce Services records, the District Court's findings are supported by substantial other evidence and are not clearly erroneous. Section 59-1-707 is a straightforward statute designed to grant the Commission an easily accessible remedy to compel persons to file tax returns who are by

law required to file the returns, but who have failed, for any reason, to do so. The statute requires a District Court to issue a Writ of Mandate ordering a person to file a Utah Individual Income Tax Return if the court finds:

(1) the person was required by Title 59 of the Utah Code to file a Utah Individual Income Tax Return;

(2) The person has failed to file such return; and

(3) Sixty days have passed since the deadline for filing, as prescribed by Title 59 of the Utah Code.

As for the first element—that the Goffs are required under Utah law to have filed tax returns for the Years in Question—the only issue before this Court is whether the Goffs had sufficient income to be required to file an income tax return. The District Court found that the Goffs did have sufficient income. This finding is not clearly erroneous and is supported by additional evidence independent of the Commission and Department of Workforce Services records.

First, the Commission initiated this action by filing with the District Court two Verified Petitions for Writ of Mandate. (R. 1-6 and 110-14.) In each Petition, the Commission averred that the income of the Goffs was over the threshold amounts. Each petition was accompanied by an affidavit signed by Mr. Dan Engh, a Commission audit manager, confirming the statements made in the Petitions.

Second, Mr. Engh testified at the hearing before the District Court that the Commission's records indicated the Goffs had earned sufficient income during the years

in question such that they were required under Utah law to file individual income tax returns for the years in question. (R. 298: 59-60.) Mr. Engh's testimony was based on information "of a type reasonably relied upon by experts in the particular field" of tax assessments. See Utah R. of Evid. 703 (2004).

Without any contravening evidence from the Goffs, these Petitions or the testimony of Daniel Engh alone are sufficient to support the issuance of the Writ of Mandate. Under Utah Code Ann. § 59-10-506(2) (West 2004), when a person fails to file a return the Commission is required to make a return on the person's behalf based on the Commission's "own knowledge and from such information as it can obtain through testimony or otherwise." Id. § 59-10-506(2)(a). Once the Commission makes such a return, it is "prima facie good and sufficient for all legal purposes" Id. § 59-10-506(2)(b). In this case, the Commission used records in its possession to determine the Goffs' income. This determination is dispositive and should be given substantial weight, unless contravened by evidence from the Goffs. Id. The Goffs have failed to introduce any contravening evidence. The testimony of Mr. Engh alone justifies the District Court's factual finding.

Third, the Goffs made admissions at the hearing and in pleadings that support the District Court's findings. Ms. Goff admitted under oath to having received $33,802 of compensation from her employer, Bonneville High School, during 1996, and of generally receiving approximately $40,000 income annually. (R. 298: 19.) Additionally, in pleadings, Ms. Goff stated that she received income throughout the years in question from

her employment with Bonneville High School. (R. 46, ¶ 15.)

Mr. Goff, likewise, admitted in pleadings that he received income from "private enterprises" during the years in question. (R. 41 ¶ 14,15.)

Fourth, other than as stated above, the Goffs invoked the Fifth Amendment and refused to testify before the District Court on questions regarding the amount of income they had received during the years in question. Under Baxter v. Palmigiano, 425 U.S. 308 (1976), the District Court was entitled to draw an inference against the Goffs as to the facts on which the Goffs invoked their Fifth Amendment rights. The Goffs were specifically asked to verify the amounts and sources of income for each year. (Addendum G, R. 298: 22-24, 27-28.) The Goffs' refusal to answer these direct questions creates an inference that they had such income when coupled with their previous admissions that they had income for all years in question and the fact that the Goffs' introduced no contrary evidence.

The U.S. Supreme Court ruled in Baxter that in a civil case, "the prevailing rule" is "the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them." Id. at 318. The Court went even further by citing Justice Brandeis' statement in a prior ruling that "Silence is often evidence of the most persuasive character." Id. at 319 (internal citations omitted). In Baxter, the defendant "remained silent at [a] hearing in the face of evidence that incriminated him," (id. at 318), just as the Goffs chose to remain silent regarding their income, in the face of testimony that they had earned income exceeding

the threshold amount triggering the filing requirement.

Contrary to the Goffs' claim, Ms. Goff was not entitled to have the District Court "Mirandize" her (Goffs' Brief at 13) before she answered questions regarding her income. The Utah Supreme Court has recognized that the right against self incrimination applies to both criminal and civil proceedings, Affleck v. Third Judicial District Court of Salt Lake County, 655 P.2d 665, 666 (Utah 1982), but the court also identified criteria which must exist to properly invoke the privilege in a civil case: A witness must "reasonably apprehends a risk of self-incrimination though no criminal charges are pending against him," and the witness must "demonstrate" a fear of prosecution that is 'more than fanciful or merely speculative.'" Id. (quoting In re Corrugated Container Antitrust Litigation, 662 F.2d 873, 883 (D.C. Cir. 1981)).

This reasoning accords with the United States Supreme Court in Minnesota v. Murphy, 465 U.S. 420, 427 (1984). The Court explained that

> the ordinary witness at a trial or before a grand jury who is subpoenaed, sworn to tell the truth, [is] obligated to answer on the pain of contempt, unless he invokes the privilege and shows that he faces a realistic threat of self-incrimination. *The answers of such a witness to questions put to him are not compelled within the meaning of the Fifth Amendment unless the witness is required to answer over his valid claim of the privilege*....in the ordinary case, if a witness under compulsion to testify makes disclosures instead of claiming the privilege, the government has not 'compelled' him to incriminate himself.

Minnesota v. Murphy, 465 U.S. 420, 427 (1984) (emphasis added). As such, there is no requirement that a Court apprise a witness, even an unrepresented witness, of his or her

rights against self-incrimination in a civil proceeding. "[N]othing in [the Supreme Court's] prior cases suggests that the incriminating nature of a question, by itself, excuses a timely assertion of the privilege." Id. at 428.

The Goffs' argument that Brady v. U.S., 397 U.S. 742 (1970), controls in this situation is without merit. Brady involved not only a criminal proceeding, but a plea of guilty by the defendant. The Court in Murphy, decided sixteen years after Brady, has since "made clear that an individual may lose the benefit of the privilege without making a knowing and intelligent waiver." Murphy, 465 U.S. at 428.

Even if the District Court was under an obligation to apprise Ms. Goff of her Fifth Amendment rights before she answered as to her income, such error is not properly raised in this civil action. If error exists, it should be raised in a criminal proceeding relying upon her admissions in this case. Id. at 426 ("if [a witness] is nevertheless compelled to answer, his answers are inadmissible against him *in a later criminal prosecution*." (emphasis added; internal quotes omitted)). There is no prohibition against using her admissions in a civil matter. Id. at 428.

The second and third elements of the Writ of Mandate Statute have also been clearly met in this case. The Goffs admit that they have not filed tax returns for the Years in Question. (R. 298: 17, 26-7, Goffs' Response in Opposition to Commission's Motion for Summary Disposition filed with this Court at 3.) For each of the Years in Question, more than sixty days has passed since the filing deadline (the deadline is April 15th of the year following each taxable year, per Utah Code Ann. § 59-10-514(1)).

Finally, if the Court declines to affirm the District Court's findings despite the totality of the other evidence, then remand is appropriate. Remand would allow the Commission to present additional evidence not previously entered because of the rapidity with which the evidentiary hearing was held, the unexpected refusal of the Goffs to answer questions regarding their income, and the fact that sufficient evidence had been admitted by the District Court negating the need for further evidence. Vacating the Writ of Mandate would be inappropriate and would not be supported by the record or the law, particularly because the Goffs have presented no evidence for the Court to conclude that they have not earned income in excess of the statutory filing threshold.

III. THE COMMISSION REQUESTS ATTORNEYS' FEES AND COURT COSTS.

The Commission requests this Court remand the case to District Court for an award of attorneys fees and court costs to the Commission incurred as a result of this appeal. Pursuant to Utah Code Ann. § 59-1-707(1)(c), a court is required to award attorneys' fees, court costs, and witness fees to the prevailing party in a Writ of Mandate proceeding under Section 59-1-707.

Oral argument and a published decision is requested.

CONCLUSION

Based upon the foregoing, the Commission respectfully requests that this Court affirm the District Court's issuance of the Writ of Mandate and remand the matter to the District Court for an award of fees and costs to the Commission.

DATED this 5 day of August, 2005.

TIMOTHY A BODILY
Assistant Attorney General